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In The

Supreme Court of the United States

October Term, 1975

No. 75-915

VERNON LEE BOUNDS, ETC., ET AL.,
Petitioners,

v.

ROBERT (BOBBY) SMITH, ET AL.,
Respondents.

R. L. TURNER, ETC.,
Petitioner,

v.

DONALD W. MORGAN, ET AL.,
Respondents.

JAMES HOLSHOUSER, ETC., ET AL.,
Petitioners,

v.

JOHN HARRINGTON, ET AL.,
Respondents.

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The petition for a writ of certiorari in this case was docketed in this Honorable Court on February 11, 1976, and the opinion of the United States Court of Appeals for

the Fourth Circuit may be found in *Smith* v. *Bounds,* ..... F.2d ..... Mem. No. 74-2378 (4th Cir. 1975). The petition for a writ of certiorari was granted by order of this Court dated April 7, 1976.

The decision of the United States Court of Appeals for the Fourth Circuit dealt with the question whether a state prisoner's constitutional right to access to the courts requires the state to provide him with extensive legal research facilities, is of particular concern to the Commonwealth of Virginia because the affirmance of the holding of the Court of Appeals in these cases could conceivably require Virginia to expend substantial capital to equip several library facilities throughout the Commonwealth, as well as to employ support personnel to staff the facilities.

Lastly, but not least, the amicus curiae is concerned with the effective and efficient disposition of cases before this Honorable Court which must also be damaged by the deluge of litigation which will surely occur should this Honorable Court sustain the holding of the 4th Circuit Court of Appeals. Accordingly, the Commonwealth of Virginia with the sponsorship of its Attorney General offers this brief in support of the petitioners' argument that the State of North Carolina is not required to provide inmates with legal research facilities.

QUESTION PRESENTED

Whether The First And Fourteenth Amendments To The United States Constitution Require State Departments Of Corrections To Provide Inmates With Legal Research Facilities.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the Counstitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourteenth Amendment to the Constitution of the United States:

Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 53-21.2, Code of Virginia (1950), as amended:

> "The judge of a court of record having jurisdiction in the trial of criminal offenses, in whose county or city the state penitentiary, a prison farm or a unit of the Bureau of Correctional Field Units, is located, shall on motion of the Commonwealth's attorney for such county or city, when he is requested so to do by the superintendent of the state penitentiary, of a prison farm or of a unit of the Bureau of Correctional Field Units, appoint one or more discreet and competent attorneys at law to counsel and assist indigent inmates therein confined regarding any legal matter relating to their incarceration, other than that pending in any court and for which an attorney at law has been appointed by the court or otherwise obtained by an inmate.

"An attorney so appointed shall be paid as directed by the court from the criminal fund, reasonable compensation on an hourly basis and necessary expenses, based upon monthly reports to be furnished the court by him."

STATEMENT OF THE CASE

The consolidated cases of *Bounds* v. *Smith, Turner* v. *Morgan,* and *Holshouser* v. *Harrington,* arose from similar claims asserted by various inmates of the North Carolina Department of Corrections to the effect that by failing to provide adequate legal library facilities, the State of North Carolina was denying reasonable access to the courts and equal protection of the laws to them. The United States District Court for the Eastern District of North Carolina, Raleigh Division, granted a motion for summary judgment submitted by the plaintiffs and required North Carolina to submit a proposed plan to provide adequate library facilities for inmates. The State filed such a plan and, at that point, the inmates objected to an omission from the plan of independent legal counsel for the prisoners as a supplement to the library facilities proposed. The district court ordered counsel for all parties to submit briefs on whether an independent attorney's office was necessary. After consideration, the court refused to require this addition and approved, with modification, the library facility plan submitted by the State.

Both the State and the inmates appealed. The Court of Appeals for the Fourth Circuit, with minor modification, affirmed the action of the district court in requiring the State to furnish legal research facilities to inmates.

ARGUMENT

The United States Court Of Appeals For The Fourth Circuit Erred In This Case In Ruling That A State Must Provide Inmates With Legal Research Facilities.

The cornerstone of the Fourth Circuit Court of Appeals in the case at bar is *Johnson* v. *Avery,* 393 U.S. 483 (1969), which invalidated a prison regulation prohibiting inmates from helping each other prepare writs or other legal papers. In an opinion written by Mr. Justice Fortas, the Supreme Court held that clearly the state could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners from filing habeas corpus petitions. Here, the court continued, a rule was adopted which, in the absence of any other source of assistance for inmates, effectively did just that. The Court concluded that for all practical purposes, if inmates were denied the assistance of jail house lawyers, their possibly vaild constitutional claims would not be heard in any court; therefore, unless and until the state provided some reasonable alternative to assist inmates in the preparation of petitions for post conviction relief, it could not validly enforce a regulation barring inmates from furnishing such assistance to other prisoners.

The second basis of the decision of the district court and the Fourth Circuit Court of Appeals in the case at bar was *Gilmore* v. *Lynch,* 319 F.Supp. 105 (N.D. Cal. 1970), *aff'd. sub nom. Younger* v. *Gilmore,* 404 U.S. 15 (1971). In *Younger* v. *Gilmore, supra,* this Honorable Court merely affirmed the judgment of the district court and cited *Johnson* v. *Avery, supra.* However, in *Gilmore* v. *Lynch, supra,* the district court enjoined the enforcement of a prison regulation which established an exclusive list of basic codes and references for prison use. In doing so the

court held that access to the courts encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him. Citing *Johnson* v. *Avery, supra,* the court further held that some provision must be made to insure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.

The court continued in the decision that the alternatives available to the State were numerous and included: public defenders to help inmates in collateral proceedings, and the institution of programs whereby law students and professors could aid the indigent convict.

At this juncture it should be noted that the Commonwealth of Virginia has chosen to provide indigent inmates with a system of appointed counsel who are available to confer with inmates regarding any legal matter relating to their incarceration, other than that pending in any court and for which an attorney has already been appointed by the court or otherwise obtained by the inmate. This system is codified in § 53-21.2 of the Code of Virginia. Further, counsel have been appointed to represent the inmates at every major institution and correctional unit in the Virginia Department of Corrections.

Although Virginia is in compliance with the holding of the Fourth Circuit in *Bounds* v. *Smith, supra,* the amicus curiae submits that the district court and the Fourth Circuit Court of Appeals have adopted a standard which exceeds the requirements of *Johnson* v. *Avery, supra,* and *Younger* v. *Gilmore, supra.* Those cases, it is submitted, are based on the premise that access to the courts by prison inmates must be more than mechanical access; it must be meaningful access. In fashioning a rule to guarantee meaningful access, the district court in *Gilmore* v. *Lynch* and

the Fourth Circuit Court of Appeals in reliance on that case have exceeded the precepts of *Johnson* v. *Avery.*

Johnson, supra, dealt with a regulation depriving inmates of the assistance of other inmates in preparing legal documents. The case held that such a regulation, without a reasonable alternative to prison "writ writers," deprived prospective petitioners of access to the courts. It is submitted that *Johnson* does not require the establishment of a law library which at a minimum would initially cost at least $13,800, plus a minimum annual upkeep of $1,800 and an additional cost for a qualified staff, Werner, *The Present Legal Status and Conditions of Prison Law Libraries,* 66 Law Library Journal 259 (Aug. 1973), but that the holding of the case is limited to the interference of penal officials with inmates rendering assistance to other inmates in drafting petitions.

Similarly, *Gilmore* v. *Lynch, supra,* was concerned with a prison rule that provided for a limited list of books available to inmates. It is submitted that the only conclusion which can reasonably be drawn from the district court's holding is that a state cannot by regulation restrict the contents of prison law libraries once they have been established when they are the only means of legal assistance available to the inmates. It is further submitted that the case does not stand for the proposition that libraries are required in the first place.

Where there is no prohibition against inmates conferring with one another for the purpose of filing petitions, it is submitted that the meaningful access to the courts sought to be protected by *Gilmore, supra,* and *Johnson* v. *Avery, supra,* is in fact protected, and the establishment of an extensive legal library is superfluous. This is especially clear when one considers that there are approximately 6,200 inmates in the Virginia penal system, and those inmates filed

in an 18-month period beginning in June of 1974 and ending in December of 1975 a total of approximately 1,639 petitions for habeas corpus or other relief. This is the equivalent to roughly 26 percent of the inmate population seeking access to the courts. Of course, there are situations in which one inmate files several petitions and the true percentage of the inmate population participating in the judicial process, it is submitted, is substantially lower than the estimate of 26 percent. Therefore, the establishment of prison law libraries would not materially contribute to the meaningful access to the courts by any greater number of inmates. This is especially true in light of the fact that such a large number of inmates now have access to the courts under the present Virginia system.

Given the underlying principle of meaningful access to the courts espoused by *Johnson* and *Gilmore,* the question of whether extensive law libraries satisfies that goal must be considered. The fact is inescapable that the average prison "writ writer" is, in spite of protestations to the contrary, uneducated, of borderline intelligence and often antagonistic towards the legal system which he views as responsible for his present predicament. The practice of law is at the least challenging and the interpretation of statutes, texts, and judicial decisions are often the subject of intense disagreement between scholarly and experienced counsel. It is submitted that furnishing prison inmates with an extensive legal library would be an exercise in futility, especially where the object of the exercise is to provide meaningful access to the courts.

The amicus curiae submits that the meaningful access to the court mandated by *Gilmore* and *Johnson* v. *Avery* can be accomplished, as those cases recognized in a number of ways, only one of which is through the establishment of a law library. In *Hooks* v. *Wainwright,* 352 F.Supp. 163

(1972) it was held that in order to insure that indigent inmates are not denied access to the courts, it is constitutionally mandated that prison authorities furnish indigent inmates with some form of legal assistance which assures meaningful access to the courts. The amicus curiae submits that this is a representative statement of the current state of the law. Any assertion that that legal assistance must be in the form of extensive, expensive libraries fails to recognize that a law library is merely one tool to achieve the constitutional right of access to the courts. Further, it is submitted that law libraries are imperfect mechanisms to achieve this end at best. A law library in the hands of the average inmate is virtually useless, whereas, implementation of the system used in the Commonwealth of Virginia of appointed counsel gives to the uneducated indigent, inmate a source of information and experience at his fingertips he could never hope to duplicate in years of research in the most extensive legal library in imagination.

It is clear that no particular mode of access to the courts by prisoners is required, but that regulations or practices which can be construed as impeding such access are invalid. *Bryan* v. *Werner,* 516 F.2d 233 (3rd Cir. 1975). While it is conceded that the lack of a law library or of access to such a library might, absent alternatives, unreasonably restrict access to the courts, it is submitted that the requirement of access can be satisfied either by the availability of legal materials, by counsel, or by any other appropriate device. *See Cruz* v. *Hauck,* 515 F.2d 322 (5th Cir. 1975).

With these principles firmly in mind, it must be noted that in *Hatfield* v. *Bailleaux,* 290 F.2d 632 (9th Cir. 1961), cert. denied, 368 U.S. 802, 82 S.Ct. 105, 7 L.Ed.2d 59 (1961), a decision by a three-judge court, while affirming the right of the incarcerated not to be unreasonably hindered in making use of the courts, added that "[s]tate authorities

have no obligation . . . to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform." *Hatfield* continued that inmates have a constitutional right to waive counsel and act as their own attorneys but that that did not mean they must be given an opportunity to acquire a legal education.

The use of legal assistants as an alternative to law libraries is a concept which has been embraced by several circuit courts. In *United States* v. *Simpson,* 436 F.2d 162 (D.C. Cir. 1970), *cert. denied* 414 U.S. 873, 94 S.Ct. 140, 38 L.Ed.2d 91 (1970), it was held that the use of law students subject to responsible supervision to counsel and advise prisoners in regard to collateral attack on convictions and sentences may provide the key toward serving the need for legal assistance without a drain on the community. In *Gaglie* v. *Ulibarri,* 507 F.2d 72 (9th Cir. 1974), a similar sentiment was expressed, although the court found that the program offered was insufficient because it provided only limited legal aid from law students at a state university and due to a heavy work load of the public defender's office it was doubtful that they would be adequately equipped to provide research assistance on an adequate scale. The amicus curiae submits that the conclusion to be drawn from the relevant case law is that while inmates have a constitutional right to access to the courts, the method whereby that access is provided is variable and can include any means necessary to effectively present any claims to the courts, including the right to the assistance of "jail house lawyers" or access to necessary legal materials. *Knell* v. *Bensinger,* 522 F.2d 720 (6th Cir. 1975). The mechanism to insure access might also include the assignment of counsel to represent inmates as is the practice in the Commonwealth of Virginia. See *Cruz* v. *Hauck, supra.* There is clearly no constitutional right to a law library and the Commonwealth of Virginia as amicus curiae submits that the availability of alternatives that provide meaningful access to the courts is sufficient without the establishment of legal libraries.

CONCLUSION

The Commonwealth of Virginia as amicus curiae on behalf of the petitioners herein, respectfully requests this Honorable Court to reverse the decision of the Court of Appeals and remand the case to the United States Court of Appeals for the Fourth Circuit with directions to vacate its opinion and remand the cases to the district court with instructions to dismiss them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed copies of the foregoing brief of the Commonwealth of Virginia as amicus curiae in support of petitioners to the Honorable Rufus Edmondson, Attorney General of North Carolina, P. O. Box 629, Raleigh, North Carolina 27602, counsel for petitioners, and to Barry Nakell, Esquire, University of North Carolina School of Law, Chapel Hill, North Carolina 27514, and to Howard E. Manning, Esquire, P. O. Box 1150, Raleigh, North Carolina 27602, on or before the 20th day of May, 1976.

ALAN KATZ
Assistant Attorney General